IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,

Petitioners,

vs.

ABRAM BRYANT,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners California Brewers Association, Theo. Hamm Company, Anheuser-Busch, Inc., General Brewing Corporation, Falstaff Brewing Corporation, Miller Brewing Corporation, Joseph Schlitz Brewing Company and Pabst Brewing Company pray that a writ of certiorari issue to review the judgment of the Court of Appeals for the Ninth Circuit in the above entitled case.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Ninth Circuit is officially reported at 585 F.2d 421, unofficially reported at 18 F.E.P Cas. 826 and is set forth in Appendix A. No opinion was rendered by the District Court for the Northern District of California.

JURISDICTION.

Although the judgment of the Court of Appeals for the Ninth Circuit was entered on November 3, 1978, petitioners filed a timely motion for rehearing, which was denied on January 11, 1979. This petition for writ of certiorari was filed within ninety (90) days of the denial of the motion for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED.

Collective bargaining agreements in force in an industry for almost 25 years include a provision that any employee who has worked for a minimum period in any calendar year is entitled to greater benefits and job security than other employees.

The questions presented are:

I

Whether this provision may be part of a seniority system within the meaning of Section 703(h) of Title VII of the Civil Rights Act of 1964.

II

Whether the Ninth Circuit's definition of seniority system conflicts with the definition of *Teamsters v. United States* (1977), 431 U.S. 324, and the definition of the Sixth Circuit in *Alexander v. Machinists, Aero. Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364.

III

Whether the Court of Appeals erred by summarily deciding the seniority system issue before the development of a factual record in the District Court in light of *Teamsters*.

STATUTORY PROVISION INVOLVED.

Section 703(h) of Title VII provides in pertinent part:

> "(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority system, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin; . . ."

STATEMENT OF CASE.

A. Respondent's Complaint.

Respondent Abram Bryant filed his original Complaint on October 9, 1973, an amended Complaint on February 15, 1974, and a second amended Complaint on May 22, 1974. The complaint alleged violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. and provisions of the Civil Rights Act of 1866, 42 U.S.C. Section 1981, because of admitted "seniority and referral" provisions in the collective bargaining agreement. Bryant, the sole named plaintiff, purported to bring a class action on behalf of all black workers who ever have been or will be employed by any of the major breweries in California, as well as all black workers who ever have or will seek such employment.

B. Statement of Facts.

1. Parties.

Respondent Abram Bryant was first employed by Petitioner Falstaff in 1968. Since that time, he was employed from time to time by Petitioner Falstaff. After the original complaint, he worked for Petitioner Hamm for a brief period.

The defendants were an employer association, a union joint board, seven breweries, and six unions.

Respondent Bryant was subject to the provisions of the collective bargaining agreement between the breweries and the unions.

2. Collective Bargaining Agreement.

The collective bargaining agreement in this case was between the California Brewers Association on behalf of various breweries and the Teamster Brewery and Soft Drink Workers Joint Board of California. It established an industry-wide seniority system, defined in Section 4 of that contract. Section 5 of the contract also governed the operation of the seniority system.[1]

The contract provided that an employee achieves permanent status and thereby acquires enhanced job benefits and security after working 45 weeks in one calendar year. The essence of Respondent's claim is that this provision perpetuates the present effects of past discrimination.

This 45 week provision has been in effect for almost twenty-five years. Respondent Bryant admits that he is unaware of any non-black employee who has achieved permanent status without meeting the 45 week requirement.

[1]Sections 4 and 5 are reproduced in Appendix B to this Petition.

a. *The Separate Tiers of Seniority in the Brewery Industry.*

The preamble to Section 4 specifically provides that with respect to Brewers and Bottlers there shall be five classes of employees "for the purposes of seniority only": (i) New employees; (ii) Apprentices; (iii) Temporary Bottlers; (iv) Temporary employees (other than Bottlers); (v) Permanent employees.

An individual's status in any of these classes (except apprenticeship) is solely a function of time served in a job classificaton in the industry.

Permanent employee status requires 45 weeks of employment within a calendar year in the brewing industry in the State of California. Temporary employee status requires at least 60 working days within a calendar year. Apprentices are covered by separate provisions. New employees are persons who do not qualify as a Permanent employee, Temporary employee or Apprentice.[2]

b. *The Operation of Seniority in the Brewery Industry.*

By satisfying the 45 week provision, the Permanent employee acquires rights to fill vacancies, or jobs held by Temporary or New employees. A Permanent employee who has been laid off by one employer

[2]Other sections of the collective bargaining agreement relate to the loss of seniority. For example, a Permanent employee who is not employed for a period of two years loses the status of a Permanent employee (Section 4(a)(5)). Similarly, an employee who quits the industry or is discharged for failure to comply with the union security requirements loses his status and seniority (Section 4(a)(5)). An example of the duality of the seniority system is apparent in this same section: a Permanent employee who is discharged by an employer loses establishment seniority with that employer but not industry seniority.

in the industry may be dispatched to another employer in the same area. The Permanent employee has a right to replace the temporary or new employee with the lowest plant seniority (Section 4(b)(7)). Industry seniority governs the choice between unemployed Permanent employees, insuring that the more senior Permanent will be entitled to a certain job (Section 5(c)(1)).

Within each class of employees, plant seniority operates (Section 4(c)). Any employee "bumped" by a Permanent employee will be the least senior employee at the particular plant.

Similarly, all lay-offs are decided on the basis of seniority (Section 4(c)(1-5)). New employees are laid off first, followed by Temporary employees. Permanent employees have the most job security. Within each classification, Permanent, Temporary or New, the least senior employee based on plant seniority is the first laid off and the most senior employee who is not working is the first rehired. Separate seniority lists are maintained for Apprentices.

Plant seniority dates from the first day of employment in the seniority tier within the establishment. When seniority of several employees dates from the same date, relative seniority is established based upon the length of service in California breweries (Section 4(c)(1)).[3]

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[3]An employee who has seniority at one establishment or plant but is working in another establishment can lose his seniority if he refuses recall to the first plant or establishment (Section 4(d)). However, an employee who accepts a transfer from one plant to another plant retains his first plant seniority for a period of two years from the date of transfer provided he is not recalled or does not transfer back to the first plant (Section 4(e)).

C. Proceedings Below and Opinion of the Appellate Court.

On September 11, 1974, the district court granted motions to dismiss as to all defendants because of plaintiff's failure to state a claim upon which relief could be granted. Judgment was entered on October 18, 1974.

On November 3, 1978, the Court of Appeals for the Ninth Circuit, in a two to one decision, held that the plaintiff had stated a claim upon which relief could be granted. The Ninth Circuit held that the 45 week provision of the collective bargaining agreement was not a seniority system, or part of a system, and might violate Title VII. The case was remanded.

REASONS FOR GRANTING THE WRIT.

I

This Case Presents an Important Issue in the Aftermath of Teamsters: The Definition of a "Seniority System" Under 703(h).

The Court of Appeals adopted a highly unusual, restrictive, and erroneous definition of "seniority systems" which is in direct conflict with *Teamsters* and the definition of "seniority system" employed by the Sixth Circuit. *Alexander v. Machinists, Aero Lodge No. 735* (1977), 565 F.2d 1364.

In this respect, the Ninth Circuit's decision purports to state a rule of law. In the context of this case, the Ninth Circuit's decision arguably establishes the law of the case, barring the parties from ever developing a factual record regarding the operation of the brewery seniority system. In other words, if the Ninth Circuit's decision is allowed to stand, the parties will be arguably bound by the Ninth Circuit's premature and erroneous holding, with no opportunity to present the factual evidence necessary to demonstrate the impropriety of the Ninth Circuit's definition. At the least, the case should be remanded, with instructions to consider the case in light of *Teamsters*.

Thus, this case presents a question of paramount importance to the continuing viability of Section 703(h) and this Court's decision in *Teamsters*. The Ninth Circuit has, in effect, disregarded *Teamsters*. It did not examine the bona fides of the system, which is the only limitation on the protectibility of seniority systems under Section 703(h). Instead, without the benefit of an adequate factual record the Ninth Circuit has dissected an operating seniority system, selecting one component of that system for judicial scrutiny under Title VII. By holding that this one component was neither a seniority system nor part of a seniority system, the Ninth Circuit found that the provision might violate Title VII, despite the comprehensive protections of Section 703(h) and the lesson of *Teamsters*. If courts are permitted to select such individual components as targets for Title VII attack, the myriad of diverse, complex seniority structures in American industry are as vulnerable as before *Teamsters*, despite Section 703(h).

Teamsters explicitly states the principle that no type of seniority system is preferred under Title VII. 431 U.S. 355, n.41. This principle is critically important to the operation of bona fide seniority systems. The vitality of this principle is the central issue that must be confronted by this Court in the aftermath of *Teamsters*.

The decision of the Ninth Circuit on the "seniority" issue is also contrary to (i) the admissions of all parties in this case that the 45 week requirement was part of a seniority system; (ii) uncontroverted facts concerning the character, operation and structure of the seniority system; and (iii) the explicit admonitions of the Supreme Court in *Teamsters*. Indeed, the Ninth Circuit decided that this component was neither a seniority system, nor part of a seniority system despite the fact that all parties initially and extensively briefed the issue assuming and admitting that the 45 week requirement was part of a seniority system.

II

The Definition of "Seniority System" Employed by the Ninth Circuit Is in Direct Conflict With Teamsters, and the Definition Employed by the Sixth Circuit.

In *Teamsters v. United States,* the Supreme Court held that the scope of Section 703(h) was comprehensive and inclusive, including no distinctions between different forms of seniority.

> "There is no reason to suppose that Congress intended in 1964 to extend less protection to legitimate departmental seniority systems than to plant-wide seniority systems. Then, as now, *seniority was measured in a number of ways, including length of time with the employer, in a particular plant, in a department, in a job, or in a line of progression.* The legislative history contains no suggestion that any one system was preferred." [Emphasis added].
>
> *Teamsters v. United States,* 431 U.S. 324, 355, n.41.

In so holding, this Court recognized the great diversity in seniority systems throughout the nation. Generally, seniority is the measure of time with an industry, employer, plant, department or job. A seniority system usually contains rules of when and how to measure seniority, and to apply seniority to such employee decisions as promotions, assignments, referrals, lay-offs, wages, shifts, overtime and many other similar situations. *All* of these elements make a seniority system.

Following *Teamsters,* the Sixth Circuit in *Alexander v. Machinists, Aero Lodge No. 735* (6th Cir. 1977), 565 F.2d 1364, adopted this realistic view of seniority systems. The district court in *Alexander,* in its opinion,

stressed that the "job equity" feature of the seniority system perpetuated the present effects of pre-Act discrimination. This "job equity" feature is very similar to the 45 week provision in the instant case. It gives an absolute preference in filling a vacancy to employees with prior, satisfactory service in the particular occupation. In other words, under this "job equity" provision, whenever a vacancy occurred, all employees having "equity"—that is, prior satisfactory service in the occupation—were given the right to return to the job before it was opened to the promotional bidding system. As among those holding equity, the vacancy would be awarded to the employee with the greatest plant-wide seniority, not the longest period of experience at that job. The effect of the "job equity" feature of the seniority system was that an employee with equity would always be preferred over an employee without equity even though the latter was deemed qualified for the position and had longer plant-wide service.

The Sixth Circuit's decision follows *Teamsters:*

> "Like the Supreme Court in *Teamsters,* we are totally unable to find that the system under attack in the instant case was established or maintained with an intent to discriminate. Like that in *Teamsters,* it applies equally to all races and ethnic groups. To the extent that it '"locks" employees into . . . jobs, it does so for all.'
>
> "With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. *The Act, however, speaks not simply of seniority but of a* ['] *bona fide seniority . . . sys-*

tem.' A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in *Teamsters* to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.

"Therefore we are obliged to hold that in light of *Teamsters,* the district court erroneously concluded that the defendants violated Title VII by utilizing a seniority system, including its job equity feature, that perpetuated pre-Act discrimination. [Emphasis added.]" [Footnotes omitted.]

Alexander v. Machinists, Aero Lodge No. 735 (1977), 565 F.2d 1364, 1378-1379.

The decision of the Ninth Circuit in the instant case conflicts with both the Sixth Circuit in *Alexander,* and this Court in *Teamsters.* This decision of the Ninth Circuit fails to recognize the diversity of seniority provisions. Since these systems are the products of collective bargaining, geared to the individual needs of individual businesses and industries, the systems have been developed in a myriad of ways.

If, as the Ninth Circuit decision signifies, the individual components of a seniority system may be subject to Title VII attack under the doctrine of *Griggs v. Duke Power Company* (1971) 401 U.S. 424, then the purpose of Section 703(h) and the holding of the Supreme Court in *Teamsters* will be frustrated. By deciding that the 45 week provision is not even part of a seniority system, the Ninth Circuit

has endangered a great number of the seniority systems currently in operation throughout the United States. If allowed to stand, this ruling would invalidate such seniority systems despite the intended operation of Section 703(h).

III

The Forty-Five Week Threshold Requirement to "Permanent" Status Is an Integral Component of the Brewery Industry's Seniority System.

Prior to any final decision that the 45 week provision may not be a protected part of a seniority system within the meaning of Section 703(h), the diverse character, definition and structure of seniority systems must be examined carefully in light of *Teamsters.*

"Seniority provisions assume an almost infinite variety and are constantly being altered and reinterpreted to meet changing or unforeseen situations. For the purposes of this discussion it is unnecessary to review the different types, which range from absolute rigidity to great flexibility, and from relative simplicity to extreme complexity."

B. Aaron, "Reflections on the Legal Nature and Enforceability of Seniority Rights," 75 Harv.L.Rev. 1532, 1534.

The 45 week provision is virtually indistinguishable from any number of seniority devices commonly employed in American industry.

First, the 45 week provision defines the extent of service which is a condition precedent to a higher

level of seniority job rights. Any number of probationary periods, eligibility requirements, or other threshold standard serve the same purpose: creating a tier of job rights distinguishable from those afforded to temporary, part-time or seasonal employees. In *Alexander,* a separate tier of seniority based on "job equity" was created, providing for the same type of preference as exists in the instant case for "permanent employees."

Second, the provision for minimum service in one calendar year is also similar to common definitions of seniority. A probationary period might require thirty days work in a two or three month period. Also, accumulated credit toward seniority is often lost due to time off—even due to lay-off. In this case, the contract provides, in essence, that more than seven weeks unemployment in a calendar year will cause loss of accumulated credit.

Finally, seniority may be "measured in a number of ways", *Teamsters v. United States,* 431 U.S. at 355, including some ways less related to a simple linear measurement of time than in the brewery system. Businesses, with seasonal changes, such as department stores or delivery companies often provide that seniority cannot be accumulated during those periods when the work force swells due to part-time or seasonal hires. Also, the device of superseniority is often used to protect the job security of union officials, without regard to actual time served.

The brewery seniority system must be viewed as one integrated structure, divided into separate tiers of seniority service, job security and benefits—defined only by a standard of *service in a particular job classification.* In short, the labor contract creates a seniority system, and the 45-week provision is part of that system.

IV

The Appellate Court Abused Its Authority When It Rendered Its Decision Without Factual Basis, and Despite Clear Admissions by the Plaintiff.

At all times prior to this Court's decision in *Teamsters,* Respondent Bryant *proclaimed* that he was attacking a seniority system which had the effect of perpetuating the present effects of past discrimination.

In the verified Second Amended Complaint, Respondent Bryant averred: "The vehicles for the perpetuation of this invidious discrimination are the *seniority* and referral provisions of the collective bargaining agreement, which were negotiated a number of years ago. [Emphasis added]" Second Amended Complaint ¶14. Respondent's characterization of the 45 week provision as a "seniority" provision was repeated frequently throughout the complaint. *Id.* ¶¶15, 23, 24.

On appeal, respondent contended that "*a seniority system like the instant one* . . . , though it now may be operating with an even hand, has the effect of perpetuating the discrimination of the past." [Emphasis added]. (Opening Brief for Appellant, p. 10). Throughout all briefs filed by all parties on this appeal prior to the Supreme Court's decisions in *Teamsters* and *Evans,* there is not the slightest suggestion that the 45 week provision was not part of the seniority system.

Indeed, only after the Supreme Court's decision in *Teamsters* and *Evans,* after all other briefs had been filed, and after the employers had no opportunity for reply, did the respondent first suggest that the 45 week provision might not be a seniority system (Appellant's Supplemental Memorandum of Points and Au-

thorities, p. 3, filed July 17, 1977). Even at this late date, the respondent conceded that the overall seniority system was immune from attack under Title VII. "Notice *we are not calling into question the overall seniority system* in the brewery industry; for the system —even though it admittedly perpetuates the discrimination of the past—is beyond attack under the Supreme Court's decisions." *Id.*, pgs. 3-4 [Emphasis added].

As a result, *the essence of the issue—the relationship of the 45 week provision to the overall seniority system—decided by the Ninth Circuit was never briefed, argued or considered in light of a full factual record.* The absence of any factual record is a fatal flaw in the judgment of the Ninth Circuit—a judgment which purports to establish the law of the case.

The Ninth Circuit erred by summarily denying the seniority character of the brewery system before the trial court had an opportunity to gather the evidence and make the appropriate factual findings. *Cf. Hazelwood School District v. United States* (1977), 433 U.S. 299; *East Texas Motor Freight System, Inc. v. Rodriguez* (1977), 431 U.S. 345.

V

Conclusion.

Teamsters v. United States interpreted Section 703 (h), reaffirming the congressional decision to place bona fide seniority systems beyond the reach of Title VII. By contrast, the Ninth Circuit's decision purports to establish a rule of law that threatens the flexibility, diversity and adaptability of seniority systems to the different industries of America, contrary to the explicit congressional purpose embodied in Section 703(h).

If the Title VII protection for seniority systems is to be effective, this Court must adopt a realistic definition of seniority systems and safeguard specific components of such systems from attack.

For these reasons, petitioners respectfully submit that a writ of certiorari should issue.

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APPENDIX A.

No. 75-1263.

United States Court of Appeals,
Ninth Circuit.

Nov. 3, 1978.

Abram Bryant, Individually and on behalf of all others similarly situated, Plaintiff-Appellant, v. California Brewers Association, Miller Brewing Company, Joseph Schlitz Brewing Company, Anheuser-Busch, Incorporated, Pabst Brewing Company, Theodore Hamm Company, General Brewing Company, Falstaff Brewing Corporation, Teamster Brewery and Soft Drink Workers Joint Board of California of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local Union 856 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America in itself and as successor to former Brewers Union Local 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Salesdrivers and Dairy Employees Union Local 166 in itself and as successor to former Brewers Union Local 893 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Bottlers Union Local 896 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Beer Drivers and Salesmen's Union Local 888 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Drivers Union Local 203 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Salesdrivers, Helpers, and Dairy Employees Union Local 683 of the International Brotherhood of

Teamsters, Chauffeurs, Warehousemen and Helpers of America, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California.

Before HUFSTEDLER and TRASK, Circuit Judges, and PREGERSON,* District Judge.

PREGERSON, District Judge:

INTRODUCTION

This appeal from the trial court's order dismissing the action pursuant to F.R.Civ.P. 12(b)(6) requires us to consider whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, may be violated by a 20 year old provision in a statewide brewery industry collective bargaining agreement. That provision in effect preserves an all White class of permanent brewery employees by defining a permanent employee as a brewery worker employed for at least 45 weeks in one calendar year. Permanent employees enjoy valuable employment benefits denied temporary employees. We conclude that this provision may violate Title VII. Accordingly, we reverse the district court's order of dismissal and remand this case for further proceedings.

In 1968 plaintiff Abram Bryant, a Black person and a member of Teamsters' Local 856, got his first brewery worker's job with Falstaff Brewing Company in Northern California. Bryant earned his living working for Falstaff until 1973 when he went to work for Theodore Hamm Company. In 1974 when this action

*The Honorable Harry Pregerson, United States District Judge for the Central District of California, sitting by designation.

was filed, despite 6 years of brewery experience, Bryant was still classified as a temporary employee because of his inability to satisfy the 45-week provision in the collective bargaining agreement between all major California breweries and brewery unions.[1] Under this provision, found in section 4 of the agreement, a temporary employee must work 45 weeks in one calendar year before he is classified as permanent[2] and entitled to additional fringe benefits and greater job security. On its face the requirement appears innocuous. The rub is that changed circumstances in the brewery industry, including greater automation, improved brewing methods, and consolidation of breweries, have lessened the demand for labor, so that now it is virtually impossible for any temporary employee, Black or White, to work 45 weeks in one calendar year.

The effect of the 45-week requirement has been to deny Bryant and other similarly-situated Black brewery workers[3] the opportunity to be classified as permament employees: no Black has ever attained permanent employment status in a California brewery. Bryant's second amended complaint therefore alleges that the

[1]The collective bargaining agreement was signed by all seven brewery defendants and all union defendants. It has statewide coverage. The agreement was negotiated on behalf of the breweries by defendant California Brewers Association and on behalf of the unions by defendant Teamsters Brewery and Soft Drink Workers Joint Board.

[2]Section 4(a)(1) of the collective bargaining agreement provides in part as follows: "A permanent employee . . . is any employee . . . who . . . has completed forty-five weeks of employment under this Agreement . . . in one calendar year as an employee of the brewing industry in this State. . . ."

[3]Although filed as a class action, the matter has not been so certified pursuant to F.R.Civ.P. 23(c)(1).

requirement violates 42 U.S.C. § 2000e-2(a) and (c),[4] prohibiting employers and unions from discriminating with respect to employment on account of an "individual's race, color, religion, sex, or national origin," and 42 U.S.C. § 1981,[5] prohibiting racial discrimination in the making and enforcement of contracts.

Although Bryant's attack is directed primarily against the 45-week requirement, the complaint also alleges violations of § 2000e-2(a)(1) and (c)(2), i.e., that defendant breweries and defendant unions have discriminated against Blacks in hiring and referring them to available brewery jobs. Finally, the defendant unions,

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[4]42 U.S.C. § 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire . . . any individual, or . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to . . . classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(c) provides:

It shall be an unlawful employment practice for a labor organization—

(1) to . . . discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to . . . classify its membership . . . or to . . . fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee . . . because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

[5]42 U.S.C. § 1981 provides:

"All persons within the jurisdiction of the United States shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens . . . ."

according to Bryant, have breached their duty of fair representation under 29 U.S.C. §§ 159(a) and 185(a) by negotiating an agreement containing discriminatory provisions.

The district court concluded that the procedures complained of by Bryant were analogous to the "last-hired, first-fired" practices permitted under Title VII[6] and granted defendants' motion to dismiss the action for failure to state a claim upon which relief can be granted. This appeal followed.

PRELIMINARY ISSUES

[1] At the outset, two preliminary issues call for consideration. First, we are asked to disallow the joinder of Southern California breweries as defendants because Bryant neither worked nor sought work in those breweries. Southern California breweries, however, are signatories to the statewide collective bargaining agreement and, as such, support and maintain the disputed contract provisions. Moreover, under the collective bargaining agreement Bryant and other Black brewery workers are eligible to work in Southern California breweries as well as in Northern California breweries. Accordingly, we find that the Southern California breweries have a sufficient connection with this lawsuit to justify their joinder under F.R.Civ.P. 20(a).

[2] Second, defendants ask us to find that the district court lacks subject matter jurisdiction over

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[6]See *Watkins v. Steelworkers Local 2369*, 516 F.2d 41 (5th Cir. 1975); *Jersey Central Power & Light v. Local Union 327*, 508 F.2d 687 (3rd Cir. 1975), *cert. denied* 425 U.S. 998, 96 S.Ct. 2215, 48 L.Ed.2d 823 (1976); *Waters v. Wisconsin Steel Works*, 502 F.2d 1309 (7th Cir. 1974), *cert. denied* 425 U.S. 997, 96 S.Ct. 2214, 48 L.Ed.2d 823 (1976).

this case. Title VII requires the Equal Employment Opportunity Commission (EEOC) to conciliate complaints within 180 days following the filing of the charge with the EEOC. 42 U.S.C. § 2000e-5(f)(1). At the end of the 180-day period, § 2000e-5(f)(1) permits the EEOC to issue a notice of right-to-sue authorizing the complainant to file suit in federal court. Bryant filed his charge with the EEOC on May 4, 1973. The EEOC issued a right-to-sue letter on July 23, 1973, 80 days later. Bryant then filed suit in the United States District Court for the Northern District of California on October 19, 1973, 12 days shy of 180 days. Defendants contend that the EEOC's failure to observe the 180-day time period bars plaintiff's claim on the Title VII charge.

[3] Defendants' contention lacks merit. Section 2000e-5(f)(1) simply requires the EEOC to issue a notice of right-to-sue if it has failed to file suit or arrange a conciliation agreement within 180 days. Nowhere does the statute prohibit the EEOC from issuing such notice before the expiration of the 180-day period.

> If a charge filed with the Commission . . . is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge . . . the Commission has not filed a civil action . . . or entered into a conciliation agreement . . ., the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge [in the appropriate United States District Court] . . . .

42 U.S.C. § 2000e-5(f)(1).

Furthermore, in 1973-1974 the undermanned EEOC staff faced a huge backlog of Title VII cases and, as a

practical matter, was unable to handle Bryant's charges within the 180-day period. Given this state of affairs, it would be a travesty to require the EEOC and Bryant to mark time until 180 days were counted off.

[4] Title VII "does not condition an individual's right to sue upon the EEOC's performance of its administrative duties." *Jefferson v. Peerless Pumps,* 456 F.2d 1359, 1361 (9th Cir. 1972). In the circumstances of this case, we decline to hold that Bryant's Title VII claim is barred by any lack of compliance with the procedural requirements of § 2000e-5(f)(1).

Having treated these preliminary matters, we now turn our attention to the question whether Bryant's complaint alleges a claim for relief under Title VII.

TITLE VII ALLEGATIONS

[5] Bryant was denied the opportunity to prove his Title VII allegations when the district court dismissed the action pursuant to F.R.Civ.P. 12(b)(6). For purposes of this appeal, the complaint is construed in the light most favorable to Bryant and its allegations are taken as true. 5 C. Wright and A. Miller, *Federal Practice and Procedure,* § 1357 (1969).

[6] After this case was first briefed and argued,[7] the Supreme Court decided three cases bearing on the Title VII claim: *United Air Lines v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977); *East Texas Motor Freight Systems Inc. v. Rodriguez,* 431 U.S. 395, 97 S.Ct. 1891, 52 L.Ed.2d 453 (1977); and *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396

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[7]The parties were permitted to file additional briefs addressing the issues raised by these three cases.

(1977). These cases hold that a bona fide seniority system that applies equally to all workers and is free of an intent to discriminate on the basis of race, color, religion, sex, or national origin in its genesis, negotiation, and maintenance is immunized by § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h),[8] even though the system perpetuates the effects of racial discrimination predating the effective date of Title VII.[9] Defendants assert that the 45-week requirement is a bona fide seniority system. They argue that even if Blacks are now foreclosed from attaining permanent status, such a result merely perpetuates the effects of possible pre-Title VII racial discrimination. Thus, defendants conclude that § 703(h) validates this requirement.

[7] The approach advanced by defendants overlooks the critical question whether the 45-week requirement, found in section 4 of the collective bargaining agreement, is in fact a seniority system or part of such a system. Section 4(a)(1) provides in part as follows: "A permanent employee . . . is any employee . . . who . . . has completed forty-five weeks of employment under this Agreement . . . in one calendar year as an employee of the brewing industry in this State. . . ." No comprehensive definition of "seniority system" is required to enable us to reject section 4(a)(1) as a seniority system, or as part of a seniority system, because, as will be shown, the provision lacks the

[8]Notwithstanding other provisions of Title VII, § 703(h) provides in part that it shall not be an unlawful employment practice for an employer to apply different employment standards "pursuant to a bona fide seniority . . . system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . ." 42 U.S.C. § 2000e-2(h).

[9]The effective date of Title VII is July 2, 1965.

fundamental component of such a system. Accordingly, we hold that section 4(a)(1) is not part of a seniority system, and therefore is not protected by section 703(h) against claims of nonintentional discrimination.

[8] The fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases. "Seniority is a system of employment preference based on length of service; employees with the longest service are given the greatest job security and the best opportunities for advancement." Aaron, *Reflections on the Legal Nature and Enforceability of Seniority Rights*, 75 Harv.L.Rev. 1532, 1534 (1962).[10]

In contrast, the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon the length of the employee's accumulated service. Under this requirement, employees junior in service to the employer may acquire greater benefits than senior employees. Although an employee must work at least 45 weeks before becoming a permanent employee, the acquisition of permanent status may be independent both of the total time worked and the overall length of employment. Some employees

[10]An employee's seniority rights generally are measured by his or her length of service in a particular area, whether it be a particular job unit ("unit seniority"), a plant ("plant seniority"), a company ("company seniority"), or even an industry. See *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721, 732 & n. 21 (5th Cir. 1976), which discusses methods used to calculate seniority in the context of formulating remedies for discrimination. Moreover, some seniority systems adopt a combination of these approaches, using different seniority measures for different purposes. For example, in *Teamsters*, company seniority was used to calculate employee benefits; bargaining unit seniority was used to determine order of layoffs.

could acquire permanent status after only 45 weeks of work, if the 45 weeks were served in one calendar year. Other employees could work for many years and never attain permanent status because they were always terminated a few days before completing 45 weeks of work in any one year. This feature distinguishes the challenged system from the seniority system considered in *Teamsters*. In *Teamsters*, the use of different measures of seniority for different purposes meant that employees might have greater seniority rights for some purposes than for others. But employees with fewer weeks of service in a particular area (company or bargaining unit) could never acquire greater benefits within that area than employees with longer service there. Under the 45-week requirement, less senior employees could acquire greater rights regardless of whether one measures seniority by length of employment in a bargaining unit, plant, company, or industry.

Clearly, section 4(a)(1) does not provide for incremental increases in employment rights or benefits based on length of overall service. By its nature, the 45-week provision is an all-or-nothing proposition. Once an employee has worked 45 weeks in any calendar year, he is classified as a permanent employee. Until that time, it makes no difference how long a person has been employed by a department, plant, company, or industry, or how close he may have come to satisfying the 45-week requirement. So long as he does not happen to work 45 weeks in any particular calendar year, he remains a temporary employee. Unlike employees

who must complete a probationary period before acquiring greater rights, temporary employees under the 45-week rule may never be able to achieve permanent status.

Under a seniority system, rights normally accrue automatically in the absence of resignation, termination, or transfer. Under the 45-week requirement, however, an employee's chances of satisfying the provision automatically terminate at the end of each year. This aspect of the 45-week requirement makes the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status. Because seniority rights under a true seniority system usually accumulate automatically over time, it is difficult to manipulate them in a discriminatory manner.

Section 4(a)(1) is simply a classification device that divides brewery industry employees into two groups. This conclusion is reinforced by the text of the collective bargaining agreement. Section 4(a)(1) is one of four subsections that define "five classes of employees." The classes of employees are permanent employees, temporary employees, temporary bottlers, apprentices, and new employees. The 45-week provision establishes a dividing line between two classes of these employees, temporary and permanent. Under separate provisions of the contract, each of the employees in these classes accumulates plant seniority from the date

of first employment in the class. But plant seniority, unlike permanent status, depends only on the passing of time and accumulates incrementally and automatically. Thus, while the collective bargaining agreement does contain a senority system, the 45-week provision is not a part of it.[11]

CONCLUSION

Because the 45-week provision is not part of a seniority system, plaintiff is not required to prove any form of intentional discrimination to make out a Title VII violation. Instead, the normal rule applies that "a *prima facie* Title VII violation may be established by policies or practices that are neutral on their face and in intent but that nonetheless discriminate in effect against a particular group." *Teamsters,* 431 U.S. at 349, 97 S.Ct. at 1861. The controlling principle is that such employment practices which have discriminatory impact violate Title VII. *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-31, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).[12]

If plaintiff is able to prove his averment that the provisions of the collective bargaining agreement were discriminatorily applied, he may then be entitled to

[11]The 45-week rule is simply a classification device to determine who enters the permanent employee seniority line and this function does not make the rule part of a seniority system. Otherwise any hiring policy (*e.g.*, an academic degree requirement) or classification device (*e.g.*, merit promotion) would become part of a seniority system merely because it affects who enters the seniority line.

[12]Section 703(h) of Title VII does not protect seniority systems that are themselves discriminatory or that had their genesis in racial discrimination. Because we have held that the 45-week provision was not part of a seniority system, we are not required to address the question whether the provision was part of an unprotected seniority system, *i.e.*, one that is not bona fide.

relief under *Franks v. Bowman Transportation Co.,* 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).

Accordingly, the judgment must be reversed and the cause remanded to give plaintiff the opportunity to prove that the 45-week provision had a discriminatory impact on Black workers in violation of Title VII, under standards enunciated in *Griggs.* On remand the district court should also consider whether plaintiff has made out a claim for relief under 42 U.S.C. § 1981 and 29 U.S.C. §§ 159(a) and 185(a).

Reversed and remanded for further proceedings consistent with the views herein expressed.

TRASK, Circuit Judge, dissenting.

I would respectfully dissent from Judge Pregerson's conclusion that the allegations in Bryant's pleadings could state a cause of action in light of the Supreme Court's decision in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977). I would therefore affirm the district court's decision dismissing this action.

APPENDIX B.

Relevant Provisions of the Collective Bargaining Agreement.

Section 4. (a) With respect to Brewers, Bottlers, Drivers and Shipping and Receiving Clerks and Checkers for the purposes of seniority only there shall be five classes of employees, as follows:

Permanent employees

Temporary employees (other than Bottlers)

Temporary Bottlers

Apprentices

New employees

Subject to the provisions of Sections 4 (1) and 43. The term temporary employee includes a temporary bottler unless the reference expressly negates such an inclusion.

(1) A permanent employee (other than Bottlers) is any employee other than an apprentice who, subject to subsection "(a)(5)" following, has completed forty-five weeks of employment under this Agreement in one classification in one calendar year as an employee of the brewing industry in this State. Temporary Bottlers shall be entitled to the full rate and permanent status after they have worked 1600 hours in a calendar year. Hours worked since January 1, 1970 shall count for this purpose.

Time lost because of sickness or injury, leave of absence, or vacation shall not be counted as "employment under this Agreement" for the purposes of this section.

All employees, except apprentices, who are on the date of this Agreement qualified as permanent em-

ployees under the provisions of the brewers' distributors' agreement previously in effect with the Teamster Brewery & Soft Drink Workers Joint Board of California and those employees covered by this Agreement who have qualified for a vacation based on employment in California as a brewer, bottler, driver or helper, or checker or shipping or receiving clerk under the provisions of a contract with another labor organization in the prior year for an employer covered hereby shall be considered permanent employees.

(2) A temporary employee (other than Bottlers) is any person other than a permanent employee or an apprentice who worked under this agreement or predecessor agreements in the preceding calendar year for at least sixty (60) working days, subject to subsection "(a) (6)", or who was a temporary employee when he entered the armed services and retains such status; provided, however, that an employee who is or was employed without gaining seniority by virtue of Subsection (g) hereof or Section 5 (b) is not given the status of a temporary employee by such employment.

A temporary Bottler is any Bottler other than a permanent Bottler as set forth in Section 4(1).

(3) An apprentice is an employee whose employment is governed by the provisions of this Agreement applicable to apprentices. An apprentice upon completion of his apprenticeship period shall take the status of a permanent employee and his seniority as a permanent employee shall commence as of the date of his employment as an apprentice.

(4) A new employee is any employee who does not qualify as a permanent employee, a temporary

employee or an apprentice; provided, however, that an employee who is or was employed without gaining seniority by virtue of Subsection (g) hereof or Section 5(b) is not given the status of a new employee by such employment. On December 31 of each year, all new employees having plant seniority at an establishment and who have worked in the industry under this Agreement for at least sixty (60) working days during the preceding twelve (12) months shall become temporary employees.

(5) A permanent employee who is not employed under this Agreement for any consecutive period of two (2) years shall thereupon lose his status as a permanent employee hereunder, provided, however, that the period of two years will be extended for any period of incapacity. A permanent employee who quits the industry or who is discharged in accordance with the provisions of Section 3 hereof shall thereby lose his status and all seniority hereunder. A permanent employee who has been discharged by any Individual Employer in the exercise of his management function shall thereby lose all seniority with such Individual Employer. Such person may regain his status as a permanent employee by being re-employed subject to this Agreement within two (2) years from such quitting or discharge.

(6) A temporary employee who is not employed subject to this Agreement for a period of one (1) year shall thereupon lose his status as a temporary employee. A temporary employee or new employees or apprentice who quits the industry or who is discharged in accordance with the provisions of Section 3 hereof shall thereby lose his status and all seniority hereunder. A temporary employee who has been discharged by

an Individual Employer in the exercise of his management function shall thereby lose all seniority with such individual Employer. Employment prior to such loss of status under this subsection shall not be counted thereafter in determining the seniority or status of such a person.

(7) A new employee who fails to qualify for transfer to temporary employee status at the end of a year shall lose his status as a new employee.

(b) A permanent employee who has been laid off and not discharged by an Individual Employer in the exercise of management's function may be dispatched—if such employee so desires—for work in any establishment of any Individual Employer in the local area of his last employment and shall have the right to replace—as of Monday—the temporary employee or new employee with the lowest plant seniority therein employed regardless of anything in this Agreement to the contrary. The Individual Employer need not employ such permanent employee unless he is competent to fill the position held by the temporary employee or new employee who is to be replaced.

(c) A seniority list for each of the five classifications of employees shall be maintained for each establishment of each Individual Employer. The last employee on the seniority list of the establishment who is working in the establishment shall be the first laid off, and the first employee on the seniority list of the establishment who is not working in the establishment shall be the first rehired. Each such seniority list shall be based on the following: Sections of the list:

(1) The first portion of the seniority list shall comprise the permanent employees other than Bottlers hav-

ing seniority in the establishment arranged in descending order of their seniority.

(2) The second portion of the seniority list shall comprise the temporary employees other than Bottlers having seniority in the establishment, arranged in descending order of their seniority.

(3) The lowest portion of the seniority list shall comprise the new employees having seniority in the establishment arranged in descending order of their seniority.

(4) Permanent and Temporary Bottlers entitled to seniority shall be placed on a separate seniority list which shall follow the procedure set forth in subsections (c)(1) and (c)(2) above.

(5) A separate list shall be maintained for apprentices.

Seniority Dates of Individual Employees

(1) The plant seniority of each permanent employee shall date from the first day of his employment as a permanent employee or apprentice in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several permanent employees dates from the same day, their relative seniority as permanent employees shall be in accord with their length of service in the industry in California.

(2) The plant seniority of each temporary employee shall date from the first day of his employment as a temporary employee in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several temporary employees dates from the same day, their

relative seniority as temporary employees shall be in accord with their length of service in the industry in California subject to (4) hereof.

(3) The plant seniority of each new employee shall date from the first day of his employment as a new employee in the establishment of the Individual Employer during his current period of unbroken plant seniority. When the seniority of several new employees dates from the same day, their relative seniority as new employees shall be in order of hire in accordance with 5(a)(3).

(4) On December 31 of each year, the names on the list of new employees having plant seniority at an establishment and who have worked in the industry under this Agreement for at least sixty (60) working days during the preceding twelve (12) months, on that date shall be transferred, in the existing sequence to the end of the list of temporary employees.

(d) An employee having seniority in one establishment while working in another establishment and who leaves the other establishment while work is available to him there in order to maintain his seniority in the first establishment shall lose plant seniority in the other establishment. An employee who elects to remain at work at the other establishment shall lose plant seniority in the first establishment.

(e) In all cases in which a permanent employee accepts a transfer from one establishment of an Individual Employer to another establishment of such Individual Employer in the local area, such employee shall retain for a period of two years from the date of such transfer his plant seniority rights in the establishment from which he was transferred. He may, upon

thirty (30) days' notice to the employer, within such two-year period, return to the individual establishment from which he was transferred and the Individual Employer may transfer such employee back to such establishment at any time within such period. In either case, his plant seniority rights therein shall be the same as if he had not accepted such transfer in the first place.

(f) Apprentices shall be subject to seniority only as between apprentices working for the same brewery establishment. Discharge by any Individual Employer in the exercise of his management function terminates all seniority rights of an apprentice.

(g) Any person employed without seniority shall gain no seniority if a person with seniority reports for such work within forty-eight (48) hours of his employment.

(h) The Individual Employer has the right to increase or reduce the number of employees at any time subject to the provisions of this Agreement.

(i) (1) Regardless of anything to the contrary in this contract contained, an Individual Employer cannot be compelled to re-employ any employee, permanent or temporary or new or applicant or apprentice, who has been previously discharged by such Individual Employer in the exercise of his management function, provided, however, that he may re-employ such employee if he so desires. If such Individual Employer does re-employ such discharged employee, such re-employed employee's plant seniority shall start from the date of such re-employment.

(2) Regardless of anything to the contrary in this Agreement, any permanent, temporary or new employee

who is discharged for dishonesty shall lose his status and seniority, if any, as of the date of such discharge, and employment prior to such loss of status and seniority shall not be counted thereafter for any purpose. Pilfering of cases or inducing bottlers or loaders to give drivers extra bottles shall be regarded as dishonesty and dealt with as above set forth. The furnishing of surety bonds against embezzlement shall be left to Individual Employer's discretion; provided, however, that said Individual Employer shall be required to pay the premium on said bond and provided further that said bond shall in no way be construed as affecting said employee's union obligation.

(j) A driver, helper or servicer covered by this contract who accepts a salesman, salesman-displayman, or displayman's job with his employer for whom he is at that time working in a classification covered by this Agreement shall, so long as he stays in the employ of the same employer at the same establishment, retain his seniority under this Agreement in such employer's establishment. If he is laid off or terminated (other than discharged for cause) from the salesman, salesman-displayman or displayman's job by such employer he may exercise such retained seniority rights provided he does so within thirty (30) days of such lay-off or termination. Should he leave the employ of such employer, he shall lose his seniority rights with such employer but shall retain his status in the industry subject to Sections 4 (a)(5) and 4 (a)(6) of this Agreement.

(k) Regardless of anything in this Agreement to the contrary, in the event that a permanent employee is laid off, he may register on the out-of-work list in any classification covered by this Agreement and

shall be eligibile to be dispatched upon the exhaustion of the temporary employees out-of-work list. In the event a salesman, salesman-displayman or displayman with five (5) years seniority in the industry in such classification or classifications who is laid off or terminated (other than discharged for cause) from such salesman, salesman-displayman or displayman's job shall be eligible to be dispatched as a permanent driver hereunder. Such employee shall accrue no seniority if dispatched in a classification other than that in which he is a permanent employee and shall have no right to bump on such dispatch, although he shall maintain and accrue seniority as such permanent employee. The Individual Employer need not employ such permanent employee unless he is competent to perform the work when dispatched in a classification other than that in which he is a permanent employee.

Salesmen, Salesmen-displaymen and Displaymen who have been employed in the industry for sixty (60) days or more shall be considered permanent employees for the purposes of registering only.

(1) (I) A Temporary Bottler is any Bottler other than a permanent Bottler.

(2) After completion of the probationary period specified in Section 31, Temporary Bottlers shall have seniority for dispatch and layoff purposes only among Temporary Bottlers. After completion of such probationary period their seniority shall be retroactive to the first day of employment in that calendar year.

(3) Temporary Bottlers may not be employed in a previously established bumping area so long as a permanent Bottler is available for employment in such previously established bumping area.

(4) A Temporary Bottler shall lose his seniority if not employed under this Agreement for one (1) year and for other reasons set forth in this Agreement providing for loss of seniority.

(5) (a) Temporary Bottlers shall work only in the classification in which dispatched. They shall receive vacation, holiday, overtime, shift differential fringes only. Pension contributions shall be made for Temporary Bottlers from the first compensable hour. Health and welfare contributions for Temporary Bottlers shall commence after the probationary period has expired. Temporary Bottlers shall be entitled to receive permanent Bottlers' pay after they have worked 3000 hours of employment under this Agreement in one classification in two consecutive calendar years as an employee of the brewing industry in this State. Hours worked since January 1, 1970 shall count for this purpose.

(b) If permanent Bottlers are available, temporary Bottlers shall work no overtime, unless a part of an entire crew.

(c) Temporary Bottlers shall be employed on a day to day basis.

Section 5. (a) The Individual Employer must secure all employees covered by this Agreement through the employment offices of the Local Union affiliated with the Teamster Brewery & Soft Drink Workers Joint Board of California, with jurisdiction.

With respect to Brewers, Bottlers, (Drivers) and Shipping and Receiving Clerks and Checkers for the duration of this agreement, satisfactory and competent men will be furnished within forty-eight (48) hours and in the event they cannot be or are not furnished, the Individual Employer may employ any person.

(b)(1) If the Individual Employer requests employees (except Bottlers) for work for less than thirty-seven and one-half (37½) straight-time hours the Local Union shall dispatch those employees readily available for dispatch and the Individual Employer may hire for such work any unemployed permanent, temporary employee, new employee or applicant for employment, without regard to seniority and such employee shall establish no seniority rights by reason of such employment for such work.

(2) If the Individual Employer requests Bottlers for work for less than thirty (30) straight time hours in a calendar week, the Local Union shall dispatch Temporary Bottlers who are registered for employment in the order of their experience in the industry and when the list of such persons is exhausted, in the order of their registration.

(c) In all other cases the Local Union shall dispatch and the Individual Employer shall hire as follows:

(1) In dispatching the Local Union shall first dispatch in accordance with the seniority provisions set out in Section "4" hereof in descending order of seniority, the employee with the highest seniority to be dispatched first.

(2) In the case of Brewers, Drivers, Shipping and Receiving Clerks and Checkers the Local Union shall next dispatch permanent employees registered in the established area who may be unemployed and thereafter temporary employees registered in the established area who may be unemployed and thereafter new employees who may be unemployed, subject to Section 43. In the case of Bottlers the Local Union shall next dispatch permanent Bottlers registered in the previously established bumping area who may be unemployed, and thereafter permanent employees registered in the previously established bumping area in other classifications, who may be unemployed, and thereafter the Individual Employer may employ Temporary Bottlers. The Individual Employer shall have full right of selection among said employees.

(3) The Local Union shall next dispatch applicants who may be registered for employment under Section "5(d)" hereof, provided, however, that in dispatching such applicants those with the most experience in the work in the State of California shall be dispatched first and those with the least experience in such work in the State of California shall be dispatched last, and thereafter those with the most experience in the work regardless of where acquired shall be dispatched first and those with the least experience in the work last, and thereafter those with no experience in the work shall be dispatched in accordance with the date the application was filed, those with the earliest date being dispatched first. The Individual Employer shall have full right of selection among said employees dispatched.

(4) The order of dispatch of permanent employees and of temporary employees and of new employees within classifications as provided in paragraph (c)(2) hereof shall be on the basis of the length of service in the industry in California.

(5) In the event an employee is dispatched pursuant to subsection "(c) (1)" hereof and he does not report for work within forty-eight (48) hours, he shall lose his seniority rights in the individual establishment to which he was dispatched, unless such failure is excused under Section "7(a), (b) or (d)" hereof.

(6) The seniority privileges protected by subsection "(c) (1) and (2)" hereof may be exercised only if such vacancy is to be filled for thirty-seven and one-half (37½) straight-time hours (30 hours in the case of Bottlers) or more and if the person with seniority reports for such work within forty-eight (48) hours of the existence of the vacancy.

(d) The Local Union shall maintain appropriate registration facilities for applicants for employment to make themselves available for job opportunities. The Local Unions and each of them will conduct such registration facilities without discrimination either in favor of or against such applicants by reason of membership in or non-membership in any union or by reason of activity on behalf of or in opposition to any union. Such dispatches will not be based or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies or requirements. Each Local Union with jurisdiction shall accept applications for employment in the various classifications as follows:

Brewers	February through March
Bottlers, Shipping and Receiving Clerks and Checkers	April through June
Drivers, Helpers and Servicers	May through June

Each application shall expire on the day preceding the first day for the receipt of such application in the following year.

(e) The Local Unions and each of them in carrying out the provisions of this Agreement with respect to seniority and hiring and the registration and dispatch of prospective employees will not discriminate either

in favor of or against such prospective employees by reason of membership in or non-membership in any union or by reason of activity on behalf of or in opposition to any union, nor shall the carrying out of the provisions of this Agreement with respect to seniority and hiring and the registration and dispatch of prospective employees be based or in any way affected by union membership, by-laws, rules, regulations, constitutional provisions or any other aspect or obligation of union membership, policies or requirements, except to the extent of enforcing Section 3 hereof.

(f) Each Local Union and each Individual Employer will post at all employment offices and at all places in any establishment where notices to employees or applicants for employment are customarily posted a copy of this Agreement.

(g) It is agreed that the matter of referring persons for employment under this agreement and operating the employment offices for such referrals is not necessarily a management or union function, but by contract may be made a union responsibility. By this contract it is made a responsibility of the union and the Local Unions in carrying out the seniority and employment rights provided in this Agreement.

The respective Local Unions and the Teamster Brewery & Soft Drink Workers Joint Board of California, agree that they will in every respect exercise the responsibility of referring workers to employment and operating employment offices therefor in accordance with law. It is distinctly understood and agreed that neither the employer nor any Individual Employer is to have or may have any right, power, voice or control over such employment offices or the operation thereof,

and that neither the Teamster Brewery & Soft Drink Workers Joint Board of California, nor any Local Union acts as the agent or representative of the employer in the operation of such employment offices. By reason of the fact that the union and the Local Unions have obtained such control thereof through regular processes of collective bargaining, it is agreed that the Union and the Local Union shall be solely responsible for their operation to all persons, agencies and tribunals, subject to the employer's right to suggest, initiate or use procedures outside this Agreement in which any alleged abuse of this function may be reviewed by others having jurisdiction.

(h) This subsection shall apply only to an Individual Employer when he has five (5) or more persons performing work covered by this Agreement. The Individual Employer will notify the employment office of the Local Union with jurisdiction by 12:00 Noon Thursday of each week of the names of brewers, bottlers, checkers or shipping and receiving clerks to be laid off at the end of the work week, and the number of such employees to be hired at the start of the work week next following. The Local Union will notify the Individual Employer the following day not later than 12:00 Noon of the number of such employees to be dispatched for employment on the following Monday to displace new Employees and/or temporary employees, and the names of such employees the Local Union was able to contact and dispatch up to that time. The above Provisions will not apply when the failure to give notice by the time specified was due to equipment breakdown, acts of God, or other reasons beyond the control of the party.

Section 6. (a) No employee shall be discriminated against for activity in or on behalf of the Union, but * * *